82-1179
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,
Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN M. CANNON
Attorney for Petitioner

Suite 842
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

QUESTIONS PRESENTED

1. Whether the court of appeals, by requiring an allegation of "intentional" discrimination on the basis of sex in order to state a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (*"Title IX"*), or its regulations, prematurely rejected the decision of this Court in *Lau* v. *Nichols,* 414 U.S. 563 (1974), which upheld an "effect" standard under the legislation on which Title IX was patterned, where the complaint alleged that respondents conduct was "arbitrary and invidious" and petitioner had proposed to meet the constitutional (intentional) standard in the district court.[1]

2. Whether the decision of this Court in *Foman* v. *Davis,* 371 U.S. 178 (1962), remains viable in holding that the spirit of the Federal Rules requires a justifying reason which is "apparent or declared" for the denial of an opportunity to amend a complaint.

3. Whether a district court has jurisdiction to consider a motion for relief from judgment under Rule 60(b), Fed. R. Civ. P., in order to amend a complaint after appeal where the mandate of the court of appeals neither precludes nor itself grants an opportunity to amend.

---

[1] Certiorari to consider questions involving the continued viability of *Lau* has been granted in *Guardians Assoc. of Police* v. *Civil Service Comm. of the City of New York,* No. 81-431, where there is a fully-developed record after trial on the merits. If *Lau* is reaffirmed in *Guardians,* the additional questions presented herein will be moot because no amendment of the complaints would be necessary. *Guardians* was argued on November 1, 1982.

PARTIES

In addition to The University of Chicago, the respondents are Northwestern University and the medical school admissions committee and officials at each university. The federal officials who had supported the position of petitioner as respondents on the writ of certiorari previously granted by this Court, Docket No. 77-926, were dismissed as parties in the district court after remand. Later, in the court of appeals, the Department of Justice filed a brief and presented oral argument on behalf of the United States as *amicus curiae*, supporting the position of petitioner on the meaning of Title IX, the validity of the regulations and the enforceability of the schools' contractual obligation to observe those regulations.

SUBJECT INDEX

APPENDIX

TABLE OF CITATIONS

Cases

Statutes

Other

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decisions of the United States Court of Appeals for the Seventh Circuit affirming the renewed dismissal of the complaints in the captioned matter and denying petitioner an opportunity to correct the defects by amendment.

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of the complaints for a second time after reversal and remand

of the first dismissal by this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), is reported officially at 648 F.2d 1104 (7th Cir. 1981). The slip opinion is set out in the attached appendix. (pp. 1a-13a) The subsequent orders of the court of appeals relating to amendment of the complaints are not reported. Copies thereof are set out in the attached appendix. (pp. 1b-2g).

JURISDICTION

The decision of the court of appeals dismissing petitioner's appeals of the orders denying her motions for relief from judgment in order to amend the complaints is dated May 13, 1982. (App. p. 1f). A timely petition for rehearing was denied on October 6, 1982. (App. p. 1g). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 901(a) of Title IX, 20 U.S.C. § 1681(a):

No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education. . . .

Section 902 of Title IX, 20 U.S.C. § 1632:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

Section 21(b)(2) of the Title IX Regulations, 45 C.F.R. § 86.21(b)(2) (now, 34 C.F.R. § 106.21(b)(2)):

> A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

STATEMENT OF THE CASE

In October, 1974, petitioner applied for admission to the 1975 entering class at each respondent medical school. She was an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and Medical College Admission Test scores, were higher than those of a substantial number of the students subsequently admitted by each school.

After voluntary action by the schools and administrative action by the Department of Health, Education and Welfare proved to be unavailable, petitioner commenced these actions in the summer of 1975. She claimed that the composition of the student body at each school reflected discrimination against women generally and that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. Specifically, she alleged that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age which had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice.[2] She sought reconsideration of her applications with-

[2] The complaints are summarized in the prior opinion of this Court. 441 U. S. at 680-681.

out regard to said policies, an opportunity to rebut any alternative explanation for her rejection and other relief.

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law, 28 U.S.C. § 1343 (4). Although each respondent school acknowledged receipt of federal financial assistance and its obligation not to discriminate on the basis of sex, the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX did not authorize a private right of action. The court of appeals affirmed. On certiorari to decide the question of private enforceability of Title IX, this Court on May 14, 1979, reversed and remanded the case for further proceedings.

On June 12, 1979, HEW, in promulgating the Final Rule under the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, declared that age restrictions are not necessary to the operation of medical education programs and are therefore prohibited by the Act. 44 Fed. Reg. 33773. Both respondent schools (and virtually every other medical school in the United States) then abolished their age restrictions for 1980 and subsequent entering classes.

On remand in the district court, the schools renewed their motions to dismiss the complaints for failure to state a claim. This time they asserted that the constitutional standard of discrimination applied to Title IX and that petitioner had failed to allege their "purpose and intention" to discriminate against women in denying admission to otherwise qualified medical school applicants such as petitioner who were over 30 years of age.[3]

[3] Neither the district court nor the court of appeals decided the schools' alternative motions for summary judgment. Both schools admitted, however, that other applicants with lower grades and test scores were accepted in the classes to which petitioner applied.

Petitioner responded that the complaints did allege the respondents' discriminatory intent by claiming that their conduct was "arbitrary and invidious." She further offered "willingly" to amend the complaints if that allegation of respondents' purpose and intention to discriminate on the basis of sex was not sufficiently clear.[4] Respondents did not challenge the scope of the traditional "arbitrary and invidious" language. They claimed, however, that the allegation had been eliminated by the prior dismissal of her claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fourteenth Amendment for a lack of state action.

The district court accepted petitioner's position that the allegation was still applicable and did encompass the requisite elements of purpose and intent. It ruled, however, the allegation was a "legal conclusion" which was not admitted *arguendo* by the motions to dismiss. The second appeal followed.

On May 6, 1981, the court of appeals, contrary to the district court, agreed with respondents and ruled that the "arbitrary and invidious" allegation was inapplicable to petitioner's Title IX claim.[5] The court further ruled that, even if the allegation were applicable to petitioner's claim under Title IX,

---

[4] Petitioner also contended that this Court's opinion that the "facts alleged in the complaints .... admitted *arguendo* by respondents' motion to dismiss the complaints, establish a violation of § 901(a) of Title IX," 441 U.S. at 680, precluded the renewed motions to dismiss. In the district court she also relied upon the decision of this Court in *Lau* v. *Nichols*, 414 U. S. 563 (1974) as well as disparate impact standard of Section 21(b)(2) of the Title IX regulations and the provisions of respondents' federal funding contracts which obligated them to observe the regulations. The United States as *amicus curiae* presented that argument on appeal.

[5] The court of appeals did not affirm the "legal conclusion" analysis of the district court. On the contrary, it expressly recognized "the liberal pleading requirements" of Rule 9(b), Fed. R. Civ. P., with respect to intent. 648 F. 2d at 1110; (App. p. 12a). This Court has since held that discriminatory intent is not a legal conclusion, but a pure question of fact. "It is not a question of law and not a mixed question of law and fact." *Pullman-Standard* v. *Swint*, ____ U. S. ____, 102 S. Ct. 1781 (1982).

"the generic 'arbitrary and invidious' language does not encompass any necessary element of intentional discrimination." 648 F. 2d at 1110; (App. p. 12a).[6] Neither the respondents nor the district court had asserted such a defect.

Based upon her earlier offer in the district court to clarify the point by amendment if necessary, petitioner moved for leave to cure the defects which had been established for the first time on appeal by amendment of the complaints in the court of appeals or to present motions for such amendment in the district court.[7] Alternatively, she requested an extension of time to petition for rehearing of the May 6, 1981 decision. On May 27, 1981, Judge Pell denied the motion to amend and granted the extension of time, in each case without comment or explanation. (App. p. 1b). Rehearing was denied on June 22, 1981. (App. p. 1c). Judge Pell's order of May 27, 1981 was not incorporated or referred to in the mandate of the court of appeals which issued on July 2, 1981.

On October 5, 1981, this Court denied a petition for a writ of mandamus urging the inconsistency of the decision below

---

[6] The opinion focused primarily on the issue of whether purposeful and intentional discrimination was required to violate Title IX. 648 F. 2d 1104-1109; (App. pp. 4a-10a). Petitioner did not directly contend otherwise in the court of appeals. *See* Note 4, *supra.* In fact, the opinion expressly noted at the outset that petitioner "maintains that the district court's holding that the constitutional (intentional) standard applied was 'premature' because she propose[d] to meet the constitutional standard in the district court." 648 F. 2d at 1105 n.1; (App. p. 3a n. 1).

[7] The offer to amend the complaints in the district court was omitted from the record on appeal pursuant to Circuit Rule 4(a). Since the district court had accepted petitioner's position that the "arbitrary and invidious" allegation of the complaints was applicable to the claim under Title IX and did encompass the "purposeful and intentional" elements of the constitutional standard of discrimination under the Fourteenth Amendment, it would have been inappropriate to act on the offer prior to the contrary decision on appeal.

with the prior decision of this Court. *In re Cannon*, 454 U. S. 811 (1981). On December 14, 1981, this Court denied a petition for a writ of certiorari urging the continued viability of *Lau*. 454 U. S. 1128 (1981). Justice White would have granted certiorari.

Motions for relief from judgment under Rule 60(b), Fed. R. Civ. P., in order to amend the complaints to correct the defects which had been established for the first time on appeal were presented in the district court and denied without comment or explanation on December 22, 1981.

Petitioner then sought a writ of mandamus confirming the authority of the district court to consider the motions for relief from judgment in order to amend the complaints and directing Judge Hoffman to vacate the orders denying the motions or to state the reasons for the denial thereof. The petition for mandamus was denied on February 4, 1982 on the ground that the effort to amend 19 months after the dismissals by the trial court was "belated". (App. pp. 1d-2d). Rehearing was sought based upon the fact that petitioner had sought leave to amend promptly after the May 6, 1981 opinion of the court of appeals had established the need for the amendments sought. Rehearing was denied on March 13, 1982 with the statement that petitioner's motion for leave to amend had been denied by the court of appeals on May 27, 1981. (App. p. 1e-2e).

On May 13, 1982, the court of appeals construed Judge Pell's procedural order of May 27, 1981 as having foreclosed the jurisdiction of the district court to consider petitioner's motions for relief from judgment in order to amend the complaints and dismissed her appeals of the denial thereof. (App. p. 1f-2f). Neither that decision nor Judge Pell's order gave any reason for such a foreclosure of the ordinary jurisdiction of the district court or for the denial of leave to amend. Rehearing was denied on October 6, 1982. (App. p. 1g-2g).

REASONS FOR GRANTING THE WRIT

1. The court of appeals has decided federal questions in a way in conflict with two applicable decisions of this Court.

a) *Lau* v. *Nichols*, 414 U. S. 563 (1974)

The May 6, 1981 decision of the court of appeals expressly rejected the continuing viability of the unanimous decision of this Court in *Lau*. 648 F. 2d at 1104-1109; (App. pp. 4a-10a). In *Guardians Association of Police* v. *Civil Service Commission of the City of New York*, Docket No. 81-431, this Court granted certiorari to consider questions involving the continued viability of *Lau*. Accordingly, petitioner incorporates by reference the reasons for granting the writ set out in the petition for a writ of certiorari in *Guardians*.

Petitioner further incorporates the reasons for granting the writ set out in her prior petition for a writ of certiorari in Docket No. 81-769. In addition petitioner submits that the decisions of the courts below denying her an opportunity to amend her complaints since the denial of that petition on December 14, 1981 have now foreclosed the possibility that it might have been premature to grant certiorari to consider the continuing viability of *Lau* in this case where the opinion of the court of appeals had noted at the outset that petitioner "propose[d] to meet the constitutional standard in the district court." 648 F. 2d at 1105 n. 1; (App. p. 3a n. 1).

b) *Foman* v. *Davis*, 371 U. S. 178 (1962)

In *Foman* this Court held that the denial of an opportunity to amend a complaint after appeal without any apparent or declared reason is an abuse of discretion.

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance to the amendments, futility of amendment, *etc.*—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of

> an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." 371 U. S. at 182.

Petitioner never "elected" to stand on her complaints rather than to amend them to cure the defects specified by the court of appeals on May 6, 1981. The opinion itself expressly noted petitioner's position that consideration of the proper legal standard for Title IX was "premature" because she proposed to meet the constitutional (intentional) standard which respondents sought to establish. 648 F. 2d at 1105 n. 1; (App. p. 3a n. 1).

The background of the pleading defects which petitioner sought to cure by amendment involved two factors. First, the continued applicability of the "arbitrary and invidious" allegation, although denied by respondents, had been accepted by the district court. Second, the insufficiency of the "arbitrary and invidious" language to embrace the constitutional standard of intentional discrimination, had not been relied upon by respondents or the district court. Thus, prior to the May 6, 1981 decision of the court of appeals, a formal motion for leave to cure such defects by amendment would have been inappropriate because the district court had accepted petitioner's position on the former and neither respondents nor the district court had relied upon the latter. The "legal conclusion" analysis of the district court had not been raised by respondents and was rejected by the court of appeals which expressly recognized "the liberal pleading requirements of Fed. R. Civ. P. 9(b)" with respect to intent. 648 F. 2d at 1110; (App. p. 12a).

The potential discretionary reasons for the denial of amendment after appeal, such as undue delay, which were set out in *Foman, supra,* 371 U. S. at 182, and referred to in the February 4, 1982 decision of the court of appeals denying a

related petition for mandamus in No. 81-3043 (App. p. 2d), would be inapplicable to Judge Pell's procedural order on May 27, 1981. All of such discretionary reasons involve factual determinations which should be made by a district court in the first instance. *Pullman-Standard, supra,* Note 5.

Respondents did not even assert any such discretionary reason in their opposition to petitioner's May 20, 1981 motion to amend in the court of appeals.[8] The record on appeal certainly did not support any requisite factual determination as the only possible conclusion on such matter. For example, respondents did not assert undue delay by petitioner in moving to amend. In fact there was no delay—and no other apparent reason for denial of the amendments sought by petitioner.

Accordingly, since there was no justifying reason apparent to deny amendment, and since none was declared, the court of appeals has foreclosed the jurisdiction of the district court to consider petitioner's motions for relief from judgment in order to amend her complaints in a way in conflict with the decision of this Court in *Foman.*

2. The court of appeals has decided an important question of federal procedure which has not been, but should be, settled by this Court.

Ordinarily, the question of amendment after appeal is within the sound discretion of the district court under Rules 15(a) and 60(b), Fed. R. Civ. P. Professor Moore states,

> "Unless the appellate court's adjudication precludes amendment or the appellate court itself grants leave to amend, the grant or denial of an amendment is within the

[8] Respondents' May 22, 1981 response in opposition to the motion to amend was based solely upon the assertion "that there had been no intentional discrimination." This clearly was no more than a denial of the facts alleged in the proposed amendments.

> sound discretion of the district court." 3 MOORE'S FEDERAL PRACTICE 15-147 (2nd Ed.) "Amendment After Appeal" ¶ 15.11.

See also, *Foman, supra,* and 6 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1489 "Amendment after Judgment and Appeal," to the same effect. Mere failure or refusal by the appellate court to itself authorize the district court to consider amendment does not "preclude" the ordinary jurisdiction of the district court to do so in its own right.

In this case, the procedural order entered by Judge Pell on May 27, 1981 denied petitioner leave to amend the complaints in the court of appeals or to present motions for such amendment in the district court. It did not purport to foreclose the district court's own jurisdiction and authority to consider motions for relief from judgment in order to amend the complaints after the mandate of the court of appeals had issued.

The October 6, 1982 order of the court of appeals noted that "the issue of the denial of the motions to amend" in the court of appeals had been raised in the petition for rehearing which was denied on June 22, 1981. (App. p. 2g). It would be incorrect, however, to infer that such petition had presented any issue as to the jurisdiction of the district court to consider motions under Rules 15(a) and 60(b) in its own right or as to the authority of a single judge of the court of appeals to foreclose such jurisdiction.

The stated purpose of the motion to amend the complaints in the court of appeals or to present motions for such amendment in the district court was that such "amendment of the complaints and further proceedings in the district court would better serve the ends of justice in this protracted litigation than a petition for rehearing and further appellate review." (Motion 5/20/81 p. 2). Granting of that motion would have averted the need for petitioner to seek rehearing in the court of appeals as

well as mandamus and certiorari in this Court without risking her entire claim, including the potential benefit of the continued viability of *Lau*, on the success of a motion for relief from judgment in the district court.

Accordingly, the court of appeals has decided that its prior authorization is required for a district court to consider a motion for relief from judgment in order to amend a complaint after appeal under Rules 15(a) and 60(b), Fed. R. Civ. P. Alternatively, it has decided that a single circuit judge may foreclose the jurisdiction of the district court to consider such motions in a procedural order notwithstanding the limitations of Rule 27(c), Fed. R. App. P., on decisions by a single judge and the fact that such procedural order was not incorporated in its mandate. In either event, the court of appeals has decided an important question of federal procedure which has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decisions of the United States Court of Appeals for the Seventh Circuit affirming the renewed dismissal of the complaints and denying petitioner an opportunity to correct the defects by amendment.

If *Lau* is reaffirmed in *Guardians* before a decision is reached on the merits of the questions presented herein, the judgment affirming the dismissal of the complaints and the orders denying amendment should be vacated by summary action and the cause remanded for further proceedings in light of such a decision in *Guardians.*

Respectfully submitted,

JOHN M. CANNON
Attorney for Petitioner

Suite 842
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

INDEX

Opinion and Orders of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1763

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,
and NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 2724—Julius J. Hoffman, *Judge.*

ARGUED SEPTEMBER 24, 1980—DECIDED MAY 6, 1981

Before PELL, *Circuit Judge*, SKELTON, *Senior Judge*,* and WOOD, *Circuit Judge.*

PELL, *Circuit Judge.* Plaintiff-appellant Geraldine G. Cannon comes before this court for a third time in her effort to gain admission to the defendants' medical schools. She was denied admission for the 1975 academic year and has been involved in litigation over the denials at all levels of the federal judiciary since that time. In her complaints, appellant claimed that the defendants' failure to admit her violated the age and sex discrimination prohibitions of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871,

* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

No. 80-1763

42 U.S.C. § 1983, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and Illinois law, Ill. Rev. Stat. ch. 48 § 884 *et seq.* The Title IX allegations are the only viable allegations remaining. Initially, the defendants moved to dismiss those allegations pursuant to Fed.R.Civ.P. 12 (b)(6) on the ground that no private right of action existed under Title IX. The district court granted these motions. 406 F.Supp. 1257 (N.D. Ill. 1976), and this court affirmed, 559 F.2d 1063 (7th Cir. 1976). After reviewing the case upon a petition for certiorari, the Supreme Court reversed, holding that a private right of action was implied under Title IX. 441 U.S. 677 (1979). Upon remand to the district court, the defendants filed renewed Rule 12(b)(6) motions to dismiss the complaints, this time on the ground that Title IX prohibits only intentional discrimination and that appellant had failed to allege such purposeful conduct by the defendants in her complaints. Following the denial of appellant's motion for a preliminary injunction which was affirmed by this court, the district court granted defendants' renewed motions to dismiss and denied appellant's cross-motions to strike. Appellant's present appeal is from those orders.

I

The factual background of this case has been set forth in the earlier opinions of the district court and this court. A short repetition, however, may be of some assistance.

The present appellees, Northwestern University Medical School and the Pritzker School of Medicine at The University of Chicago, were two of the ten medical schools to which appellant unsuccessfully applied in 1975. Her undergraduate grade point average (GPA) in science and math related courses was 3.17 of a possible 4.00. The average GPA in these courses of the accepted applicants at the Pritzker School was 3.70 and at least 50% of all applicants to Northwestern had higher GPAs than appellant. On the science portion of the medical college admission test, appellant scored in the lower half of the applicant group to the defendant schools. On the quantitative portion of the test, she scored in the bottom

half of the applicants to Northwestern and in the bottom 20% of the applicants to the University of Chicago.

In 1975, only 110 of over 6700 applicants were accepted at Northwestern while only 104 of 5427 applicants were accepted at Chicago. The Dean of the Pritzker School stated in an affidavit that at least 2000 applicants with better academic qualifications than appellant were rejected. At Northwestern, only seven applicants with lower academic qualifications were admitted: five blacks and two women. During the period from 1971 to 1975, 18.1% of the applicants to the Pritzker school were women while 18.3% of the entering classes were women, and 2.2% of all women applicants were admitted while 2.1% of all male applicants were admitted.

Appellant's suits, which were consolidated in the district court's dismissal, are based upon the admission policies of the defendant schools which in 1975 either discouraged individuals over the age of 30 from applying, or, in the case of Northwestern, prohibited the admission of any applicant over the age of 35 who did not possess an advance academic degree. At the time of her application, appellant was 39 years old and had no such degrees. She asserts that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women. Appellant claims that the defendants' age policies therefore resulted in sexual discrimination violative of Title IX.[1]

[1] Appellant's argument on this issue is somewhat confused. It is clear from the district court's opinion given orally in court that the primary issue before it was the proper standard to be imposed under Title IX; *i.e.*, whether that statute could be violated by disparate impact alone. In her brief to this court, however, appellant maintains that the district court's holding that the constitutional (intentional) standard applied was "premature" because she "propose[d] to meet the constitutional standard" in the district court. Only as a secondary argument here does the appellant assert that a disparate impact alone is sufficient to violate Title IX. We shall approach the problem as did the district court and first address whether the intentional-conduct standard applies under Title IX.

II

Before we proceed to discuss the central issue on this appeal, that is, whether Title IX incorporates an intentional discrimination test or a disparate impact test, we must first address appellant's argument that the Supreme Court decided finally the issue before us now in its previous decision in this case. Appellant asserts that because the Court reversed the prior dismissal of her complaints granted on the ground that she failed to state a claim, the Court implicitly found her complaints to be adequate for the purposes of all further Rule 12(b)(6) motions.

This contention may quickly be dismissed. The only issue before the Supreme Court on the prior appeal in this case was whether Title IX implied a private right of action. The Court did not consider any other potential ground for dismissal of appellant's complaints in its opinion. This was made clear in the opinion of Justice Stevens for the Court:

> Accepting the truth of [appellant's] allegations for the purposes of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in the federal court. 559 F.2d 1063. We granted certiorari to review that holding. 438 U.S. 914

Cannon v. The University of Chicago, 441 U.S. 677, 680 (1980) (footnote omitted). The fact that the Supreme Court and this court assumed *arguendo* the sufficiency otherwise of appellant's complaints for the purposes of the prior appeal does not disallow the appellees' attack on those assumptions here.

III

Addressing the merits of the district court's opinion, we note that the Supreme Court in *Cannon* indicated that we should look to Title VI for guidance regarding

the proper interpretation of Title IX.[2] 441 U.S. at 694-96. Looking to Title VI, it appears that in the past it has been assumed to apply the disparate impact test. This was the result of the Supreme Court's action in *Lau v. Nichols*, 414 U.S. 563 (1974), upholding certain regulations promulgated by HEW under Title VI. The regulations provided that school systems receiving federal financial assistance "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination," or have "the effect of defeating or substantially impairing accomplishment of the objectives of the programs as respects individuals of a particular race, color, or national origin." 414 U.S. at 568, *quoting* 45 C.F.R. § 80.3(b)(2). In the opinion by Justice Douglas, the Court noted that the defendant school district had "contractually agreed to 'comply with Title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 C.F.R. Part 80) which are 'issued pursuant to that title . . .'" 414 U.S. at 568-69, and concluded that "[w]hatever may be the limits of [the Federal Government's power to fix the terms on which its money allotments to the States shall be disbursed] . . ., they have not been reached here." *Id.* at 569 (citations omitted). The Court therefore reversed a court of appeal's holding that no relief was available under the regulations.

The implication in *Lau* that the disparate impact or effects test applied under Title VI became subject to question by the later language in *Board of Regents v.*

---

[2] Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

Title IX, 20 U.S.C. § 1681, provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance. . . .

Bakke, 438 U.S. 265 (1978). In that case where the Supreme Court invalidated an affirmative action special admissions program at the University of California Medical School, Justice Powell was of the opinion that Title VI should be held to impose the intentional discrimination standard. After discussing the legislative history of Title VI, he concluded:

> In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.

438 U.S. at 287. A violation of the Equal Protection clause had previously been held to require a finding of intentional discrimination; disparate impact alone will not support a cause of action under the Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

Though the dissenters in *Bakke* felt that the affirmative action program at the University should have been upheld, the opinion by Justice Brennan joined in by Justices White, Marshall and Blackmun concurred in Justice Powell's statement that the constitutional standard applied under Title VI:

> We agree with Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection clause of the Fourteenth Amendment itself.

438 U.S. at 325

> In our view, Title VI prohibits only the uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; . . ."

Id. at 328. The dissenters later expressly questioned the continued viability of the *Lau* implications after the *Bakke* decision:

> We recognize that *Lau* when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976), which rejected the general proposi-

No. 80-1763

> tion that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least in some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Id. at 352.

In a recent Supreme Court opinion, Justice Marshall, joined by Justice Brennan and Justice Blackmun, concurred and expressed similar sentiments:

> In *Bakke*, five members of the Court were of the view that the prohibitions of Title VI—which outlaw racial discrimination in any program or activity receiving federal financial assistance—are coexistent with the Equal Protection guarantees of the Fourteenth Amendment.

Fullilove v. Klutznick, 48 U.S.L.W. 4979, 4998 n.1 (July 2, 1980). Similarly, in *Board of Education v. Harris*, 444 U.S. 130 (1979), the Court clearly indicated that *Lau* is not dispositive of the issue of the standard under Title VI. In that case, the Court held that certain sections of the Emergency School Aid Act (ESAA) incorporated the disparate impact standard for testing illegal racial discrimination. When addressing the Board's argument that because Title VI required intentional discrimination for a violation so should the ESAA, the Court stated:

> There is . . . no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Consideration of that issue would be necessary only if there were a

positive indication either in Title VI or in ESAA that the two Acts were intended to be coextensive.

Id. at 149.

* * *

It does make sense to us that Congress might impose a stricter standard under ESAA than under Title VI of the Civil Rights Act of 1964. A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when the ESAA violation is found.

Id. at 150.

ESAA was an attempt by Congress to bring about the same remedy without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination.

Id. at n. 13.

The dissent in *Board of Education* by Justice Stewart with Justices Powell and Rhenquist joining, also assumed that the *Lau* implication was not good law on this point. The Justices expressed the opinion that the intent standard should apply alike to the ESAA and Title VI. When addressing the majority's argument that the legislative history of § 703 of the ESAA, the so-called Stennis Amendment, indicated that the section was to impose only the disparate-impact test, Justice Stewart stated:

My difficulty with this reasoning stems from the fact that the Stennis Amendment is applicable not only to ESAA, but also to Title VI of the Civil Rights Act of 1964, and the latter has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, five members of the Court concluded that Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination

> violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth. *Id.* at 281-287 (Powell, J.); *id.* at 325-355 (Brennan, J., White, Marshall, and Blackmun, J.J.). Those constitutional provisions, in turn, have been construed to reach only purposeful discrimination. *Dayton Board of Education v. Brinkman*, 433 U.S. 406; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252; *Washington v. Davis*, 426 U.S. 229; *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189. It thus follows from *Bakke* that Title VI prohibits only purposeful discrimination.

Id. at 159-60, *and see id.* at 162.

It would seem from the above quoted language that seven of the Justices of the Supreme Court support the view that a violation of Title VI requires intentional discrimination.[3] We agree that this is the better view and other courts are in accord. In *Parents Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979), for example, the court noted that at least in school discrimination cases, Title VI should be held to impose the intentional discrimination standard. The court distinguished its earlier opinion in *Board of Education of New York City v. Harris*, 584 F.2d 576 (2d Cir. 1978), *affirmed on other grounds*, 444 U.S. 130 (1979), where it had held that Title VI was violated by disparate impact alone in an employment discrimination context. The court noted that the earlier opinion had relied upon an analogy to Title VII which had been held to impose the disparate impact test, but decided that in the school case, the proper analogy would be to Title IX which by its terms imposed the higher intentional dis-

[3] The three Justice plurality opinion in *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (1980), does not alter this conclusion. In *Fullilove*, the Chief Justice cited *Lau* as an example of a broad interpretation of Congress' power to remedy discrimination. The citation does not serve as a reaffirmance of the *Lau* implications at issue here especially since Justice Burger's opinion was joined in by Justices Powell and White who expressed the view in *Bakke* that Title VI imposes the intentional discrimination standard.

crimination standard. 598 F.2d 716, *see* 42 U.S.C. § 2000c-6. The court held, therefore, that the higher standard ought to apply under Title VI in the school discrimination area. In agreement is the detailed opinion in *Bryan v. Knoch*, 492 F.Supp. 212, 229-33 (S.D.N.Y.), *affirmed*, 627 F.2d 612 (2d Cir. 1980), where the court held that the closing of a city hospital must be shown to have been intentionally discriminatory to be a violation of Title VI, *Lora v. Board of Education*, 623 F.2d 248, 250 (2d Cir. 1980), which held that the assignment of handicapped children to special schools must be shown to be intentionally discriminatory to violate Title VI, and *Harris v. White*, 479 F. Supp. 996, 1002 (D. Mass. 1979), which held the intent standard applied to a Title VI challenge to a city's employment practices. *Board of Education* discussed in *Parents' Association* and which relied upon *Lau* in reaching its conclusion that Title VI imposed the disparate impact test in the employment discrimination area, would not seem to aid significantly appellant's position here in light of the Supreme Court's distinguishing Title VI from the ESAA in its affirmance of the case, and the Second Circuit's narrowing of the *Board of Education* holding in *Parents' Association*.

In short, we believe that a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly.

IV

The complaints appellant filed in these actions contain no express allegations that her applications to the defendants' medical schools were purposefully or intentionally rejected because of her sex. It is clear from the text of her complaints that appellant's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women. With regard to the Title IX claims, the complaints allege simply:

No. 80-1763

A material criterion for defendants' denial of plaintiff's application for admission to the September 1975 entering class at [the defendants'] Medical School[s] was her age which, in the circumstances of application to medical school, is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school[s]. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*, as amended by Title IX of the Education Amendments of 1972, P. L. 92-318, § 901(a) which provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

and the specific regulations promulgated by the Department of Health, Education and Welfare thereunder, 45 C.F.R. § 86.21(b)(2) which provides:

> "A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criterion which do not have such a disproportionately adverse effect are shown to be unavailable."

This claim of disparate impact,[4] even when coupled with the allegations made in appellant's brief to this court that the defendants knew of this impact while enforcing their age policies, is insufficient to establish a violation of Title IX. *Personnel Administrator v. Feeney,*

[4] It goes without question, of course, and appellant has not contended otherwise, that the regulation can not impose a standard broader than that imposed by this statute.

442 U.S. 256, 279 ("'Distriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.'") (citation and footnote omitted); *Lora, supra*, at 250 (" . . . 'foreseeable result' . . . standing alone is not sufficient to establish the requisite discriminatory intent . . .," *citing Columbus Board of Ed. v. Penick*, 443 U.S. 449, 462 (1979)). An illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact.

Nor do we believe that appellant's allegations under her § 1983 claims that defendants acted "arbitrarily and invidiously . . . in violation of the Fourteenth Amendment" are sufficient. These claims were dismissed by the district court after its original hearing because of appellant's failure to allege sufficient state action. The dismissal was affirmed by this court and appellant failed to seek review in the Supreme Court. The statements in these claims, therefore, are inapplicable to appellant's separate claims under Title IX. Even if the language were applicable, however, we would still find it inadequate. Notwithstanding the liberal pleading requirements of Fed. R. Civ. P. 9(b), the generic "arbitrary and invidious" language does not incorporate any necessary implication of intentional discrimination, and we agree with the district court that the allegation that the policies were "in violation of the Fourteenth Amendment" is nothing but a legal conclusion. *Plate v. Shepard*, 446 F.2d 1239, 1244 (6th Cir. 1971). In short, appellant has alleged nothing more than that a facially neutral age policy had a disparate impact upon women due to the domestic role they have traditionally assumed prior to continuing their education. No allegations have been made from which it can be inferred that it was more likely than not that discriminatory considerations were involved in the defendant's actions. *Compare, Daye v. Harris*, ... F.2d ....., (No. 79-2371, D. C. Cir., Jan. 15, 1981). The disparate effect alone, even if established, would not warrant relief under Title IX. The district court therefore was correct in dismissing appellant's complaint for failure to state a claim.

No. 80-1763

V

For the reasons stated previously, the district court's dismissal of appellant's complaint is affirmed. In doing so, we express no opinion on the defendants' alternative argument that the record as it presently exists establishes a sufficient legitimate explanation for appellant's rejection to avoid liability even under the disparate impact standard. Although the defendants' argument is persuasive on this issue, we need not now venture into areas the district court found no need to investigate.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—5-6-81—350

[Heading omitted]

May 27, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

[Caption for No. 80-1763 omitted]

This matter comes before the Court for its consideration upon the following documents:

1) The "MOTION TO AMEND COMPLAINTS OR, IN THE ALTERNATIVE, TO EXTEND TIME FOR FILING A PETITION FOR REHEARING and SUGGESTION FOR CLARIFICATION" filed herein on May 20, 1981, by counsel for the plaintiff-appellant.

2) The "RESPONSE TO MOTION TO AMEND COMPLAINTS" filed herein on May 22, 1981, by counsel for the defendants-appellees.

3) The "MOTION TO SUPPLEMENT" filed herein on May 22, 1981, by counsel for the plaintiff-appellant.

On consideration thereof,

IT IS ORDERED that plaintiff-appellant's motion to amend complaints is hereby DENIED.

IT IS FURTHER ORDERED that plaintiff-appellant's alternative motion for an extension of time in which to file a petition for rehearing is hereby GRANTED, and the time for filing plaintiff-appellant's petition for rehearing is hereby extended to and including June 9, 1981.

[Heading omitted]

June 22, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. BYRON G. SKELTON, Senior Judge*
Hon. HARLINGTON WOOD, JR., Circuit Judge

[Caption for No. 80-1763 omitted]

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Geraldine G. Cannon, Plaintiff-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Byron G. Skelton of the United States Court of Claims is sitting by designation.

[Heading omitted]

February 4, 1982

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

[Caption for No. 81-3043 omitted]

This matter comes before the court for its consideration upon the following documents:

1. "PETITION FOR WRIT OF MANDAMUS" filed herein on December 29, 1981, by counsel for the petitioner.
2. "JOINT RESPONSE OF THE UNIVERSITY OF CHICAGO AND NORTHWESTERN UNIVERSITY TO PETITION FOR WRIT OF MANDAMUS" filed herein on January 14, 1982, by counsel.
3. "MOTION FOR LEAVE TO REPLY" filed herein on January 19, 1982, by counsel for the petitioner.
4. "REPLY" received herein on January 19, 1982, from counsel for the petitioner.

On May 23, 1980, the trial court dismissed petitioner's complaints in her case against the University of Chicago and her case against Northwestern University for failure to allege that petitioner's applications to the medical schools of the respondent universities were purposefully or intentionally rejected because of petitioner's sex is required to state a claim under Title IX of the Education Amendment of 1972, 20 U.S.C. Sec.1681 et seq.

This Court subsequently affirmed the dismissals on May 6, 1981. *Cannon v. The University of Chicago, et al.*, 648 F.2d 1104 (7th Cir. 1981). The Supreme Court denied a petition for a writ of certiorari on December 14, 1981.

The petition for mandamus here requests this Court to vacate the orders of the trial court of December 22, 1981 denying the motions for leave to amend and to direct that the

trial court be authorized to consider and decide the merits of the motions to amend and state reasons for any denial thereof.

Petitioner has presented a Motion for Leave to Reply to the joint response to her petition. IT IS ORDERED that this motion be GRANTED.

In her reply, petitioner relies on *Foman v. Davis*, 371 U.S. 178(1962) to support her claim that a refusal by the District Court to grant leave to amend "without any justifying reason" is an abuse of discretion. Petitioner's reliance on this case is disingenuous, at best. In the same paragraph upon which petitioner relies, the Supreme Court also states:

> In the absence of any *apparent or declared* reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance to the amendments, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id, at 182. (emphasis added)

It is apparent to this Court, as it surely must have been to the District Court, that this case presents a number of the reasons that may be relied on for a denial of a motion to amend—reasons that need not be declared. For example, petitioner moved in the trial court for leave to amend the complaints in each case by adding allegations of intentional discrimination 19 months after the dismissals by the trial court. The instant case is not like *Foman* where the District Court dismissed petitioner's complaint for failure to state a claim upon which relief might be granted and petitioner promptly moved to vacate the judgment and amend the complaint.

We regard the effort by petitioner to amend her complaint at this time as belated. In May of 1980 when the trial court dismissed the complaints for failure to allege intentional discrimination against petitioner because of her sex, petitioner elected to stand on the complaints and did not move to amend. It is too late now to revivify this cause.

IT IS ORDERED that the Petition for Writ of Mandamus be DENIED.

[Heading omitted]

March 16, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

[Caption for No. 81-3043 omitted]

This matter comes before the Court for its consideration upon the following document:

The "PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC" filed herein on February 18, 1982, by counsel for the petitioner.

On consideration thereof,

Petitioner correctly relies on *Cohen v. Illinois Institute of Technology*, 581 F. 2d 658 (7th Cir. 1978) as to the proper procedure for seeking leave to amend after affirmance of dismissal of a complaint. While an amendment in either the appellate court or trial court is generally not allowed in such a situation, an amendment can be allowed with leave of the Court of Appeals. The appellate court may itself grant leave to amend or it may remand to the district court with express permission to consider the motion.

In May of 1981, plaintiff-appellant presented this Court with a motion for "leave to amend the complaints . . . or to present motions for such amendment in the district court." On May 27, 1981, this Court denied plaintiff-appellant's motion to amend complaints.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Geraldine G. Cannon, petitioner, no judge in active service* has requested a vote thereon, and all the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

---

* Judge Eschbach and Judge Posner did not participate.

[Heading omitted]

May 13, 1982.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

[Caption for Nos. 82-1107 and 82-1120 omitted]

This matter comes before the court for its consideration upon the following documents:

1. "JOINT MOTION OF THE UNIVERSITY OF CHICAGO AND NORTHWESTERN UNIVERSITY TO DISMISS APPEALS" filed herein on March 25, 1982, by counsel for the defendants-appellees.
2. "RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPEALS" filed herein on April 8, 1982, by counsel for the plaintiff-appellant.

Appellees contend that the sole issue that Mrs. Cannon can be raising in these appeals is that the district court erred in refusing to permit her to amend her complaints. In support of their motion to dismiss, appellees contend that this court has already ruled that the district court's decision was correct.

On December 29, 1981, Mrs. Cannon filed with this court a petition for writ of mandamus against Judge Julius J. Hoffman. The petition for mandamus requested that this court vacate the orders of the trial court of December 22, 1981 denying the motions for leave to amend, and direct that the trial court be authorized to consider and decide the merits of the motions to amend and state reasons for any denial thereof.

The standard of review applied by this court when presented with a petition for writ of mandamus is whether or not the district court judge has abused his discretion. On February 4, 1982 this court found, in denying Mrs. Cannon's petition for a writ of mandamus, that there had been no abuse of discretion. In that order we pointed out that Judge Hoffman was well within the bounds of his discretion in not stating reasons for denying plaintiff leave to amend her complaint. The order of February 4, 1982 gave examples of apparent reasons that need not be stated by the district court in denying leave to amend. These were merely examples, not an all inclusive list. In fact, one apparent and unstated reason that the district court could rely on in this case for denying plaintiff leave to amend, a reason more specifically pointed out in this court's order of March 16, 1982 denying Mrs. Cannon's petition for rehearing and rehearing *in banc*, is that this court had on May 27, 198[1] denied plaintiff leave to amend in the Court of Appeals or to present motions for such amendment in the district court.

While an amendment in either the appellate court or trial court is generally not allowed after the affirmance of a dismissal of a complaint, an amendment can be allowed with leave of the Court of Appeals. The appellate court may itself grant leave to amend or it may remand to the district court with express permission to consider the motion. *Cohen V. Illinois Institute of Technology,* 581 F.2d 658 (7th Cir. 1978).

In May of 1981, this court considered plaintiff's motion to amend after this court had affirmed the district court's dismissal of Mrs. Cannon's complaint. This court denied Mrs. Cannon's motion. Therefore, the district court did not, in December 1981, have jurisdiction to rule on the merits of the renewed motions to amend presented by plaintiff in these cases. For these reasons, the orders of the district court denying plaintiff leave to amend were correct and these appeals are hereby DISMISSED.

[Heading omitted]

October 6, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

[Caption for Nos. 82-1107 and 82-1120 omitted]

This matter comes before the court for its consideration upon the following documents:

1) "MOTION FOR CONSOLIDATION OF RELATED APPEALS" filed herein on August 5, 1982 by counsel for the plaintiff-appellant.

2) "JOINT RESPONSE OF THE UNIVERSITY OF CHICAGO AND NORTHWESTERN UNIVERSITY TO MOTION FOR CONSOLIDATION OF APPEALS" filed herein on August 9, 1982.

3) "JOINT RESPONSE TO MOTION FOR CONSOLIDATION OF APPEALS" filed herein on August 10, 1982 by counsel for the defendants-appellees.

4) "PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC" filed herein on May 27, 1982 by counsel for the plaintiff-appellant.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR CONSOLIDATION OF RELATED APPEALS" is DENIED.

In the "PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC", appellant correctly states that the expressed reason for dismissal of these appeals was that a May 27, 1981 procedural order by Judge Pell in a prior appeal, denying plaintiff-appellant leave to amend her complaints here or in the district court, had foreclosed the jurisdiction of the district court to entertain such motions. Appellant now argues that the order entered by Judge Pell was a substantive decision, forming "a significant, indeed the dispositive, element in the decision on the prior appeal" and "[s]o construed it would conflict directly with the provisions of Rule 27(c), Fed.R.App.P., 'that a single judge may not dismiss or otherwise determine an appeal or other proceeding.' "

We note, however, that the issue of the denial of the motions for leave to amend in the prior* appeal was presented in the "PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC" filed on June 9, 1981 (and denied on June 22, 1981) in that case. The whole court reviewed appallant's contentions, effectively reconsidering the motions, and therefore we find that these motions were not actually decided by a single judge so as to be in conflict with the Federal Rules of Appellate Procedure.

On consideration of the "PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC" filed in the present consolidated appeals by Geraldine G. Cannon, petitioner, no judge in active service** has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS FURTHER ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981), *cert denied, 454* U.S. *811* (1981).

** Judge Posner did not participate.

No. 82-1179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,
Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,
and NORTHWESTERN UNIVERSITY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STUART BERNSTEIN
SUSAN S. SHER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

THOMAS H. MORSCH
WLLIAM H. THIGPEN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

ARTHUR M. SUSSMAN
The University of Chicago
Chicago, Illinois 60637
Attorneys for Respondents The University of Chicago, et al.

MARTHA P. MANDEL
Northwestern University
Evanston, Illinois 60201
Attorneys for Respondents Northwestern University, et al.

QUESTION PRESENTED

The trial court dismissed petitioner's complaint for failure to state a claim. The Court of Appeals affirmed and denied petitioner's motion for leave to amend in that court or to permit petitioner to present a motion to amend in the trial court. Petition for Writ of Certiorari to review the dismissal was denied. Petitioner then moved to amend in the trial court 19 months after dismissal of the complaint. The motion was denied. Petitioner appealed the denial, and the Court of Appeals dismissed the appeal. Did the trial court err in refusing to permit amendment after the Court of Appeals had denied leave to present a motion to amend?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,
and NORTHWESTERN UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Geraldine Cannon asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the May 13, 1982 order of the Court of Appeals in Case Nos. 82-1107 and 82-1120 dismissing her appeal from an order of the trial court denying her motion to amend her complaint. The Court of Appeals had previously in Case No. 80-1763 upheld dismissal of the complaint for failure to allege purposeful discrimination in an action for violation of Title IX of the Education Amendments of 1972. *Cannon* v. *University of Chicago*, 648 F. 2d 1104 (7th Cir. 1981). The

Court of Appeals had also, in that prior appeal, denied petitioner's motion to amend the complaint to include allegations of purposeful discrimination or to permit the trial court to entertain a motion to so amend. This prior decision of the Court of Appeals was itself the subject of a petition for writ of certiorari which was denied by this Court (No. 81-769). 454 U. S. 1128 (1981).[1]

Respondents The University of Chicago, Northwestern University, and their respective medical school admissions officials respectfully submit that the court below properly dismissed petitioner's appeal. The Court of Appeals simply followed the well-established rule that amendment is not permitted in the trial court after dismissal of a complaint is affirmed on appeal unless leave of the appellate court is obtained. E.g., 3 Moore's Federal Practice § 15.11 at 15-147 (2d ed. 1980). Because the Court of Appeals, in No. 80-1763, had denied petitioner's motion to amend and had denied petitioner leave to present a motion to amend in the trial court, the trial court had no further jurisdiction in the matter. With the denial of the subsequent petition for writ of certiorari by this Court in No. 81-769 this protracted litigation was at an end. Petitioner's motion to amend filed thereafter in the trial court was properly denied, and the Court of Appeals dismissal of the appeal from that denial was correct.

The Court of Appeals' decision raises no important questions of federal law and creates no conflict with any other federal court decision; therefore, the petition should be denied.

STATEMENT OF THE CASE

This is the fourth time this case has been before the Court. A brief review of the prior proceedings is necessary to set the circumstances of the current Petition.

---

[1] Petitioner attempts to present this issue again in the current Petition. See Cert. Pet. i, Question 1. As we argue below, this is not properly before the Court at this time.

Separate suits were commenced in the summer of 1975 against The University of Chicago and Northwestern University after each had denied petitioner's application to its respective medical schools.[2] The complaints alleged discrimination on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681, et seq.[3] The two actions were treated together and have been consolidated for purposes of appeal. To simplify this statement, the separate suits and identical disposition will be treated as one in this Brief.

The trial court and Court of Appeals initially dismissed the complaint on the ground that a private right of action did not lie to enforce Title IX, and that only administrative remedies were available. This Court reversed, holding there was a private right of action, and the case was remanded for further proceedings. *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

Upon remand, respondents moved to dismiss for failure to allege that the universities had denied Ms. Cannon's application for admission to their medical schools with the purpose and intent of discriminating against her because of her sex.

The trial court reserved ruling on the motions to dismiss and held a six-day evidentiary hearing on petitioner's petition for a preliminary injunction. The petition was denied after hearing; petitioner appealed the denial, and the Court of

---

[2] Ms. Cannon also sought admission to eight other medical schools in 1975 and was not admitted to any of them. (Transcript of Proceedings on Plaintiff's Application for a Preliminary Injunction, September 21, 1979, at 74-75, N.D. Ill., Nos. 75-C-2402, 2724.) In 1979 she filed suit against the five other Illinois medical schools. *Cannon* v. *University of Health Sciences/The Chicago Medical School, et al.*, No. 79 C 5009 (N.D. Ill.). Appeal from dismissal of these complaints is now pending (No. 82-2239, 7th Cir.).

[3] Other claims asserted in the original complaint have been disposed of and are no longer relevant.

Appeals affirmed on April 25, 1980 by unpublished opinion (No. 79-2207). Appeal was preceded by a Petition for Emergency Writ of Mandamus (No. 79-2117) and Application for Extraordinary Writ of Rule Nisi (No. 79-2118), both of which were also denied.

On May 23, 1980, the trial court granted respondents' motion and dismissed the complaint on the ground that it had failed to allege that the universities had purposefully discriminated against petitioner. Petitioner then filed another Petition for Emergency Writ of Mandamus (No. 80-1736), which was denied by the Court of Appeals on May 30, 1980. Petitioner then appealed the order of dismissal of May 23, 1980. The Court of Appeals affirmed, holding that a violation of Title IX required purposeful discrimination. *Cannon* v. *University of Chicago*, 648 F. 2d 1104 (7th Cir. 1981).

On May 20, 1981 after the Court of Appeals decision but before its mandate issued, petitioner filed in the Court of Appeals a Motion to Amend Complaints, requesting "leave to amend the complaints as specified herein or to present motions for such amendments in the district court." The amendment proposed was the conclusory allegation of "purposeful and intentional discrimination against women." This motion was denied by order of May 27, 1981. Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 22, 1981. Copies of the orders of the Court of Appeals of May 27 and June 22, 1981 are included in the Appendix to the Petition now before this Court. (Cert. Pet. App. 1b, 1c.)

Petitioner then filed in this Court a Petition for Writ of Mandamus to the Court of Appeals for the Seventh Circuit attacking the dismissal and affirmance (No. 81-45), followed by a Motion to Expedite Consideration of the Petition for the Writ of Mandamus. This Court denied the mandamus petition on October 5, 1981. *In re Cannon*, 454 U. S. 811 (1981).

A Petition for Writ of Certiorari seeking review of the affirmance of the dismissal was then filed and was denied on December 14, 1981. 454 U. S. 1128 (1981).[4]

On December 22, 1981—19 months after the dismissal by the trial court and more than a year after the Court of Appeals had expressly denied leave to amend or to present a motion for leave to amend in the trial court—petitioner moved in the trial court for leave to amend the complaint by adding allegations of purposeful discrimination. The trial court denied the motion. Petitioner than filed another Petition for Writ of Mandamus in the Court of Appeals, which was denied on February 4, 1982 (No. 81-3043). Petitioner next filed a Petition for Rehearing and Suggestion for Rehearing En Banc with respect to the February 4, 1982 order denying the Mandamus Petition. This was denied on March 16, 1982.

Pending disposition of the Petition for Writ of Mandamus, petitioner appealed from the trial court's order of December 22, 1981, denying the motion to amend (Nos. 82-1107, 82-1120).

Inasmuch as the issue raised on the appeal was the identical issue raised, fully briefed, and already decided by the Court of Appeals in consideration of the mandamus petition by orders of February 4 and March 16, 1982, the universities on March 26, 1982 moved to dismiss the appeal. This motion was granted on May 13, 1982. On May 27, 1982, petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc of the order of May 13, 1982. This Petition was denied on October 6, 1982.[5]

The Petition now before the Court followed.

---

[4] In neither the mandamus petition nor certiorari petition did petitioner seek review of the order of the Court of Appeals denying leave to amend or leave to present a motion to amend in the trial court.

[5] The orders of the Court of Appeals of February 4, March 16, May 13, and October 6, 1982 are included in the Appendix to the Petition now before the Court. (Cert. Pet. App. 1d, 1e, 1f, 1g.)

ARGUMENT

1. Introduction

The Court of Appeals has reviewed the issue of petitioner's motion to amend her complaint following affirmance of the trial court's dismissal of the complaint for failure to state a claim on six separate occasions and in six separate orders has upheld the dismissal.[6] These decisions state abundant reasons for the trial court's denial of leave to amend her complaint: (1) petitioner's decision to elect to stand on her complaint after it was dismissed by the trial court; (2) the belatedness of petitioner's attempt to amend in the Court of Appeals more than a year after the trial court's dismissal of the complaint and in the trial court 19 months after dismissal; (3) the trial court's lack of jurisdiction to rule on the merits of petitioner's motion to amend after the Court of Appeals denied leave to present such a motion.

The futility of the proposed amendment is an additional ground. Petitioner has acknowledged that her proposed amendment was merely formal rather than substantive; she has never intended to meet the required showing of purposeful discrimination as defined in *Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979).

2. The Issue of Purposeful Discrimination Under Title IX Is Not Appropriately Raised in the Petition.

The current Petition attempts to raise again the question of whether purposeful discrimination is necessary to establish a violation of Title IX, rather than mere disparate impact. See Question 1. This was not an issue in the most recent decision of the Court of Appeals leading to the current Certiorari Petition. The issue here is properly limited to the question of amendment

[6] Orders of May 27, 1981 (App. 1b); June 22, 1981 (App. 1c); February 4, 1982 (App. 1d); March 16, 1982 (App. 1e); May 13, 1982 (App. 1f); and October 6, 1982 (App. 1g).

of complaint after affirmance of dismissal of the complaint on appeal and after the Court of Appeals has denied leave to amend.

Purposeful discrimination was the central issue in the earlier Court of Appeals decision in *Cannon* v. *University of Chicago*, 648 F. 2d 1104 (7th Cir. 1981). Petition for a Writ of Certiorari was filed from that decision on October 20, 1981, and was denied on December 14, 1981. 454 U. S. 1128 (1981). There was no petition for rehearing of that denial.

On January 11, 1982 the Court granted certiorari in *Guardians Association* v. *Civil Service Commission of New York*, 454 U. S. 1140 (1982). One of the questions presented in *Guardians* relates to the requirement of proof of discriminatory intent in an action under Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, a statute analogous to Title IX.

Petitioner apparently assumes that the granting of certiorari in *Guardians* one month after denial of certiorari in *Cannon* on a similar issue automatically revived the *Cannon* petition. The Court clearly could not have intended by granting certiorari in *Guardians* to revoke *sub silentio* the denial of certiorari in *Cannon*.

3. There Is No Conflict With *Foman* v. *Davis*

Petitioner alleges that the decision below conflicts with *Foman* v. *Davis*, 371 U. S. 178 (1962). This is simply inaccurate. *Foman* held that, "[i]n the absence of any apparent or declared reason," leave to amend a complaint should be "freely given." 371 U. S. at 182. *Foman* is inapposite for two reasons. First, unlike petitioner here, the petitioner in *Foman* moved to amend her complaint in the trial court *one day* after the court dismissed her complaint.[7]

[7] Petitioner states that she "never 'elected' to stand on her complaint rather than amend to cure the defects specified by the court

(Footnote continued on following page)

Second, this Court in *Foman* stated that there were no reasons apparent in the record to justify the trial court's decision. By way of contrast, the Court of Appeals here stated that "this case presents a number of reasons that may be relied upon for a denial of a motion to amend." (Order of February 4, 1982, Cert. Pet. App. 2d.)

The court below explained that *Foman* held, contrary to Ms. Cannon's assertion, that the reasons need not be declared so long as they are apparent on the record. The court gave examples of proper reasons for the denial of the motion to amend in this case in its orders of February 4, 1982 (App. 1d), March 16, 1982 (App. 1e), May 13, 1982 (App. 1f) and October 6, 1982 (App. 1g).

Specifically, the Court of Appeals noted that petitioner's attempt to amend was "belated." (Order of February 4, 1982, Cert. Pet. App. 2d.) Petitioner had elected to stand on her complaint and had failed to move to amend until after her appeal was denied. In its order of May 13, 1982 dismissing the appeal, the court below also noted that the trial court did not have jurisdiction to entertain petitioner's motion to amend: the Court of Appeals had already affirmed the trial court's order dismissing the complaint and had expressly denied petitioner

---

(Footnote continued from preceding page)

of appeals on May 6, 1981." (Cert. Pet. 9.) In fact, this is precisely what she did. She did not move to amend in the trial court until December 22, 1981 after affirmance of the trial court's dismissal and denial of the petition for writ of certiorari in No. 81-769. Her assertion that the trial court accepted her argument that the allegation of "arbitrary and capricious" conduct was sufficient is not correct; the "arbitrary and capricious" language cited by petitioner referred only to petitioner's § 1983 claim, which had been dismissed because of insufficient state action. See decision of the court below in No. 80-1763 at Cert. Pet. App. 12a.

leave to amend after appeal in that court or in the trial court. (Cert. Pet. App. 2f.)[8]

Finally, there was an additional ground for denying leave to amend: the amendment petitioner sought would clearly have been futile because petitioner has never intended to meet the standard of purposeful discrimination as defined by this Court.

The basic theory of petitioner's claim is described in the lower court's opinion affirming the dismissal of the complaint (648 F. 2d 1104, 1105):

> Appellant's suits, which were consolidated in the district court's dismissal, are based upon the admission policies of the defendant schools which in 1975 either discouraged individuals over the age of 30 from applying, or, in the case of Northwestern, prohibited the admission of any applicant over the age of 35 who did not possess an advanced academic degree. At the time of her application, appellant was 39 years old and had no such degrees. She asserts that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women. Appellant claims that the defendants' age policies therefore resulted in sexual discrimination violative of Title IX.

Petitioner sought to amend her complaint by simply adding allegations that the age policies of which she complained were adopted for the purpose of discriminating against women on the basis of sex.

It is clear, however, that the proposed amendments were, in petitioner's view, formal only and raised no additional

---

[8] "Once an appeal has been taken from the judgment, the district court no longer has jurisdiction over the case and cannot reopen the judgment to allow an amendment to be made." Wright & Miller, Federal Practice and Procedure § 1489, at 448 (1971 ed.) *Accord, United States Fidelity & Guaranty Co.* v. *Perkins*, 388 F.2d 771, 772 (10th Cir. 1968).

evidentiary burden. In a Summary Outline of Position filed as Exhibit A to her Motion for Leave to Amend in the Court of Appeals, petitioner candidly set forth her interpretation of the meaning of her proposed amendment (at A-1):

> [P]laintiff consistently has contended that defendants applied their age policies to plaintiff with the intent—in the sense of voluntariness with an awareness of the consequences on women such as plaintiff who have interrupted education or a career in favor of motherhood—and for the purpose—in the sense of intent as aforesaid *and* the absence of any legitimate purpose sufficient to justify the discriminatory effect of such age policies on women as an incidental or unavoidable side effect—of discriminating against women.

Petitioner thus contended that, because the universities' age policies were known to have an adverse impact on women, their adoption establishes the requisite intent to discriminate.

Even assuming that respondents were aware that an age policy would have an adverse impact on women, that would not be sufficient to establish a discriminatory purpose where the policy is gender-neutral on its face. Petitioner's argument was considered and rejected by this Court in *Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979). There a veterans preference statute was held not to manifest an intent to discriminate against women even though the legislature must have known that most veterans—in fact 98%—were men:[9]

---

[9] Contrary to the obvious adverse impact of a veterans preference statute, such as considered in *Feeney*, here adverse impact is not apparent. The percentage of females admitted to the respondent medical schools was slightly higher than the percentage of female applicants, hardly a manifestation of an adverse impact. *See Cannon* v. *University of Chicago*, 559 F.2d 1063, 1067 (7th Cir. 1976). *See also Cannon* v. *University of Chicago*, 441 U.S. 677, 748 n. 19 (1979), dissenting opinion of Justice Powell.

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of the consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

442 U. S. at 279

Counsel for petitioner has frankly stated there would have been nothing further to support the claim of intentional discrimination. In an interview published in *Equal Opportunity in Higher Education* (Capitol Publications), December 28, 1981, John Cannon, petitioner's husband and counsel, discussed the impact of the denial of certiorari by this Court from the decision of the Court of Appeals requiring purposeful discrimination under Title IX:

> . . . John Cannon, who represents his wife Geraldine in the six year old legal battle, said he will try to win the sex bias lawsuit against two universities by using the exact same evidence to allege intentional bias . . .
>
> Attorney Cannon said that biased motives can be inferred from the different impact that age policies have on men and women. The fact that officials could not justify the age policy on academic grounds and knew that it would affect women disproportionately proves they acted with intentional bias, he claims.

Petitioner's theory of "intentional" discrimination has already been rejected by this Court in *Feeney*. Any amendment would have merely served to protract further this already incredibly long and involved litigation.

4. The Petition Does Not Present Any Unsettled Questions of Federal Procedure

Contrary to petitioner's assertions (Cert. Pet. 10), the decision below is governed by well-established principles of federal procedure. 3 Moore's Federal Practice § 15.11 at 15-147 (2d ed. 1980):

> Where, although given an opportunity to amend, the pleader has stood upon his pleading and appealed from a judgment of dismissal, he will not normally be able to amend either in the appellate court, or in the trial court if the order of dismissal is affirmed, unless the mandate of the appellate court expressly permits such amendment.

As noted by *Moore*, "a contrary rule would, in effect, allow an interlocutory appeal." (*Id.* at 102, 1982-3 Supp.) *Accord, Cohen* v. *Illinois Institute of Technology*, 581 F. 2d 658, 662 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135 (1979).

Since the Court of Appeals expressly denied petitioner's motion to amend her complaint in that Court or for leave to present such a motion to the trial court, the trial court properly denied the motion to amend.[10]

In sum, petitioner's motions to amend were considered on six separate occasions by the Court of Appeals. The court below fully considered all of the arguments raised by petitioner here and denied petitioner's motion based upon well-established principles of federal procedure. Petitioner has failed to raise any issues justifying issuance of a writ.

---

[10] Petitioner "alternatively" argues (Cert. Pet. 12) that the May 27, 1981 order was improperly issued by a single judge. However, as the Court below noted in its order of October 6, 1982, the entire court reviewed petitioner's motion to amend in deciding the Petition for Rehearing and Suggestion for Rehearing En Banc (denied on June 22, 1981; App. 1c). In addition, the decisions of the court below of February 4, 1982 (App. 1d) and of May 13, 1982 (App. 1f) were decided by three judge panels, while the decision of October 6, 1982 (App. 1g) was rendered by the full court.

CONCLUSION

For the reasons set forth herein, Respondents The University of Chicago and Northwestern University pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STUART BERNSTEIN
SUSAN S. SHER
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

THOMAS H. MORSCH
WLLIAM H. THIGPEN
JAMES S. WHITEHEAD
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

ARTHUR M. SUSSMAN
The University of Chicago
Chicago, Illinois 60637
Attorneys for Respondents The University of Chicago, et al.

MARTHA P. MANDEL
Northwestern University
Evanston, Illinois 60201
Attorneys for Respondents Northwestern University, et al.

February 4, 1983

No. 82-1179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

JOHN M. CANNON
Attorney for Petitioner

Suite 842
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

SUBJECT INDEX

TABLE OF CITATIONS

Cases

Statutes

Other

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

A. Respondents Acknowledge the Conflict With *Lau* and the Pendency of the Same Issue in *Guardians.*

It is undisputed that this case presents the question of whether an "effect" standard may be applied to foreclose policies which discriminate on the basis of race or sex in federally-assisted programs under Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, or its predecessor legislation, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* Respondents, in their joint brief opposing the petition, flatly admit that the court of appeals has decided this federal question in a way in conflict with the

decision of this Court in *Lau* v. *Nichols*, 414 U. S. 563 (1974), and that the same issue is now pending before this Court in *Guardians Association of Police* v. *Civil Service Commission of the City of New York*, No. 81-431. (Jt. Br. pp. 6-7. *Cf.* Pet. Cert. p. 8).

B. Summary of Reply Argument

Respondents acknowledgment of the conflict with *Lau* and the pendency of the same issue before this Court in *Guardians*, in and of itself would justify issuance of the writ to address the first question presented in the petition. (Pet. Cert. Question 1). Respondents, nevertheless, request that the petition be denied because they dispute the additional reasons set out in the petition for granting the writ. To do so they rewrite the decisions below to deny the conflict with *Foman* v. *Davis*, 371 U. S. 178 (1962), and to avoid the jurisdictional question presented under Rule 60(b), Fed. R. Civ. P. (Pet. Cert. Questions 2 and 3). They also grossly distort the applicable rule of pleading and the record to assert that amendment would be futile. Respondents' transparent revisions of the decisions below and the record bare the flaws in their opposition to the petition. The revisions also reflect an inability to face the questions presented and a consistent reluctance to obtain a decision on merits in this protracted litigation.

1. Respondents rewrite the decision below to deny the conflict with *Foman*.

Respondents deny the conflict of the decision below with the decision of this Court in *Foman* v. *Davis*, 371 U. S. 178 (1962), that the spirit of the Federal Rules requires a justifying reason which is "apparent or declared" for the denial of an opportunity to amend a complaint. (Jr. Br. pp. 7-11). To do so they must rewrite the decision below. This is evident from the following:

Respondents' Brief	Court of Appeals Orders
"These decisions state abundant reasons for the denial of leave to amend her complaints. . . ." (Jt. Br. p. 6). "Specifically, the Court of Appeals noted that petitioner's attempt to amend *was* 'belated.'" (*Id.* at 8. emphasis added). "Petitioner *had* elected to stand on her complaints and *had* failed to move to amend until after her appeal was denied." (*Ibid.* emphasis added).	"[T]his case presents a number of reasons that *may* be relied upon for a denial of a motion to amend—reasons that need not be stated." (Pet. Cert. App. p. 2d. emphasis added). "These were merely *examples* * * * that the district court *could* rely on in this case. . . ." (*Id.* at 2e. emphasis added).

The clear thrust of this Court's holding in *Foman* is that the *actual* justifying reason for the denial of amendment must be "apparent or declared." Any case, including both this case and *Foman* itself, *may* present a number of *possible* reasons that *could* be relied on to deny amendment after an appeal. If examples of theoretical or possible reasons are sufficient, *Foman* is no longer viable. Neither the district court nor the court of appeals stated any actual reason for denying petitioner an opportunity to amend in either court.

On May 13, 1982 the court of appeals held that "the district court did not have jurisdiction to rule on the merits of the renewed motions to amend" because Judge Pell's procedural order of May 27, 1981 had denied petitioner's motion to amend. (Pet. Cert. App. p. 2f). In terms of *Foman*, however, that statement is completely inadequate because Judge Pell's order had stated no reason for the denial. (*Id.* at 2b). Neither did the order denying rehearing in banc on June 22, 1981. (*See Id.* at 2g).

Respondents transparent attempt to convert examples of possible reasons on which the district court could rely (notwithstanding its lack of jurisdiction to rule on the merits at all) into declarations by either of the courts below that such reasons

actually applied to this case confirms the conflict with *Foman* set out in the petition. (Pet. Cert. pp. 8-10).

2. Respondents substitute their argument for the ruling of the district court to avoid the jurisdictional question under Rule 60(b).

Respondents claim that the jurisdictional question presented under Rule 60(b), Fed. R. Civ. P., is governed by "well-established" principles of federal procedure. (Pet. Cert. Question 3; Jt. Br. pp. 11-12). They do so, however, on the basis of having first substituted their argument in the district court for the ruling of that court. (Jt. Br. pp. 3, 7-8 n. 7). This is evident from the following:

Respondents' Argument	District Court Ruling
"[T]he 'arbitrary and invidious' language cited by petitioner referred only to petitioner's § 1983 claim." (Jt. Br. pp. 7-8 n. 7).	"There are no allegations, purposeful discriminations other than legal conclusions that the acts of defendants were 'arbitrary and invidious.' These allegations are not accepted by the Court as true . . . ." (R. Tr. 5/23/80 p. 20).

After the substitution of their argument for the ruling of the district court is eliminated, the quotation from 3 Moore's Federal Practice § 15.11, on which respondents attempt to rely, clearly supports the position of petitioner, not respondents. (Jt. Br. p. 12).

Professor Moore expressly limits his statement that a pleader "will not normally be able to amend either in the appellate court, or in the trial court" to circumstances "[w]here, *although given an opportunity to amend,* the pleader has stood upon his pleading and appealed." Here, the amendments sought by petitioner to cure the defects specified by the court of appeals on May 6, 1981, would not have cured, or even addressed, the "legal conclusion" ruling of the district court on

May 23, 1980. Plaintiff had no prior opportunity or occasion to cure the defects specified by the appellate court on May 6, 1981. She moved to amend promptly thereafter.

The amendments required to cure the defects specified by the appellate court would have been futile with respect to the "legal conclusion" defect relied upon by the district court, notwithstanding "the liberal pleading requirements of Fed. R. Civ. P. § 9(b)" with respect to intent. (*See* Pet. Cert. App. p. 12a). In fact, the "legal conclusion" ruling implicitly rejected both of the defects on which the appellate court subsequently relied to affirm the dismissal. (Pet. Cert. pp. 5-6).

3. Respondents' assertion that amendment would be futile, grossly distorts the applicable rule of pleading and the record.

Finally, petitioner must reply briefly to the assertions that the proposed amendments would be "futile" because she "never intended to meet the standard of purposeful discrimination as defined by this Court." (Jt. Br. pp. 6, 9-11).

First, respondents' argument that amendment would be "futile" suggests that, in the context of amendment to cure defects for which a complaint has been dismissed, futility refers to something other than the failure of a proposed amendment to cure the defect for which the complaint has been dismissed.[1]

[1] Respondents' notation that petitioner's complaint against five other Illinois medical schools was dismissed is inaccurate. (Jt. Br. p. 3 n. 2). On the contrary, the district court allowed amendments substantially identical to those sought here in order to cure the defects specified by the court of appeals in this case on May 6, 1981. The present appeal in that case involves summary judgments on the grounds of mootness and laches. At issue is whether these schools must remedy the effect of their former age policies on petitioner in addition to providing assurance that the claimed violation will not recur, and whether petitioner's delay in filing that action until after this Court reversed the first dismissal in this case constitutes laches. Consolidation of the appeals was denied on October 6, 1982. (Pet. Cert., App. p. 1g.).

It is difficult to imagine a more inaccurate and pernicious rule of pleading than respondents' suggestion that petitioner should be denied an opportunity to amend because of their contention that she will not be successful in proving the fact of "purposeful and intentional" discrimination against women which she seeks leave to allege. Such an argument is no more than a denial of the facts alleged in the proposed amendment. Such a denial does no more than present an issue of fact for trial.

Second, respondents' assertion that "petitioner has never intended to meet the standard of purposeful discrimination as defined by this Court" distorts the record. On the contrary, the proposed amendments were squarely based upon this Court's statement in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979). In particular, petitioner intended to prove that each respondent school "selected or reaffirmed" its former age policy "at least in part 'because of' not 'mostly in spite of' its adverse effect upon" women. *Id.* at 279.

CONCLUSION

The importance and substantiality of the questions presented have not been denied. The premature rejection of *Lau* is admitted. In light of the inability to face the additional issues presented in the petition without grossly distorting the decisions below and the record, the need for plenary review is indisputable. Indeed, petitioner suggests that summary reversal is now in order, even before *Guardians* is decided and even if *Lau* is not reaffirmed therein.

For these reasons and the reasons set out in the petition, a writ of certiorari should issue to review the decisions of the United States Court of Appeals for the Seventh Circuit affirming the renewed dismissal of the complaints and denying petitioner an opportunity to correct the defects by amendment.

Respectfully submitted,

JOHN M. CANNON
Attorney for Petitioner

Suite 842
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163